

STATE OF MICHIGAN  
COURT OF APPEALS

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DIANE HARDIN,

Plaintiff-Appellant,

v

DAVID W. PRIESKORN, D.O., and TRI-  
COUNTY ORTHOPEDICS, P.C.,

Defendant-Appellees.

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UNPUBLISHED

April 1, 2014

No. 311193

Oakland Circuit Court

LC No. 2012-124878-NH

Before: METER, P.J., and JANSEN and WILDER, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(7). We affirm.

Plaintiff brought this medical malpractice action in connection with injuries she allegedly received as a result of total knee replacement surgery that was performed by defendant Prieskorn on August 3, 2009. The issues properly before this Court are whether the limitations period was tolled by agreement of the parties and whether the doctrine of equitable estoppel applies so as to prevent defendants from using the statute of limitations as a defense.<sup>1</sup>

After plaintiff provided defendants with notice of intent to file suit, the limitations period was tolled for a period of 182 days, making February 1, 2012, the expiration date of the applicable two-year limitations period. MCL 600.2912b; MCL 600.5838a; MCL 600.5856.

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<sup>1</sup> Plaintiff also argues that her complaint alleged negligence in connection with her post-surgical visits and that her complaint was timely filed with regard to these visits. Plaintiff fails to develop this issue with adequate authority and argument; she merely cites an unpublished case and also attempts to distinguish a case relied upon by defendants, stating that it provides "supportive commentary" for plaintiff's position. In light of the paucity of the briefing, we decline to address the issue. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority").

Plaintiff filed her complaint on February 10, 2012. Plaintiff alleges that sometime in January 2012 she entered into an oral agreement with James Olivetti, an employee of defendants' malpractice insurance provider, to toll the limitations period for two weeks.

This Court reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(7). *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681-682; 599 NW2d 546 (1999). "We consider all documentary evidence submitted by the parties and accept the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true." *Id.* "We view the uncontradicted allegations in favor of the plaintiff and determine whether the claim is time-barred." *Id.*

Plaintiff relies on the Supreme Court's decision in *Pitsch v Blandford*, 474 Mich 879; 704 NW2d 695 (2005), to support her position. Unlike in the present case, however, in *Pitsch*, *id.* at 879, the parties had entered into an unambiguous agreement to toll the statute of limitations. The Supreme Court held that because such an agreement was in place, it was to be enforced as written. *Id.* In the present case, there was insufficient evidence that *the parties* entered into a valid and enforceable agreement at all. As noted by defendant, plaintiff alleges only that a representative of defendants' insurance company orally agreed to toll the limitations period, and there was insufficient evidence that this person was authorized to bind defendants to such an agreement.<sup>2</sup> As such, plaintiff's reliance on *Pitsch* is misplaced. Because the existence of a clear and unambiguous agreement to toll the statute of limitations was not apparent from the evidence submitted, the trial court properly found that the *Pitsch* holding did not apply to the alleged oral agreement between the parties in the present case. Nor did the evidence submitted raise a factual issue for trial.

Plaintiff argues that equitable estoppel applies and barred defendants from raising the statute of limitations as a defense. For equitable estoppel to apply, plaintiff must establish that (1) defendants' acts or representations induced plaintiff to believe that the statutory limitations period would not be enforced, (2) plaintiff justifiably relied on this belief, and (3) she was prejudiced as a result of her reliance on the belief. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204-205; 747 NW2d 811 (2008).

On January 25, 2012—seven days before the February 1, 2012, filing deadline—plaintiff's counsel, Steve Weiss, forwarded to Olivetti a written tolling agreement. Weiss asked Olivetti to review the proposed written agreement and contact him with any changes Olivetti thought necessary, or otherwise to sign and return it. Even assuming that Weiss had previously reached some sort of oral agreement with Olivetti, when Olivetti still had not signed the agreement or otherwise replied to the request by January 31, 2012, there was clearly no

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<sup>2</sup> As noted by defendant, it is incumbent on the party who relies on an alleged agency to show what authority the agent actually had, see *Selected Investments Co v Brown*, 288 Mich 383, 388; 284 NW 918 (1939), and "[a]gency may not be established by proof of declarations by the supposed agent," *In re Union City Milk Co*, 329 Mich 506, 513; 46 NW2d 361 (1951).

justification to delay the filing of plaintiff's complaint further and allow the February 1, 2012, filing deadline to pass.<sup>3</sup>

The trial court properly found that justifiable reliance by plaintiff was absent and that the doctrine of equitable estoppel, therefore, did not apply to prevent defendants from raising the statute of limitations as a defense.

Affirmed.

/s/ Patrick M. Meter

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder

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<sup>3</sup> Moreover, as noted, Olivetti was merely a representative of defendants' insurer.